

ORAL ARGUMENT REQUESTED BUT NOT YET SCHEDULED

**CASE NO. 15-1184
(CONSOLIDATED WITH CASE NO. 15-1242)**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

**OZBURN-HESSEY LOGISTICS, LLC,
PETITIONER/APPELLANT,**

v.

**NATIONAL LABOR RELATIONS BOARD,
RESPONDENT/APPELLEE,**

**UNITED STEEL, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION
INTERVENOR.**

**Petition for Review and Cross-Petition for Enforcement of a Decision and
Order of the National Labor Relations Board**

FINAL REPLY BRIEF OF OZBURN-HESSEY LOGISTICS, LLC

Ben H. Bodzy
Stephen D. Goodwin
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.
Baker Donelson Center, Suite 800
211 Commerce Street
Nashville, Tennessee 37201
(615) 726-5600

ATTORNEYS FOR PETITIONER

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GLOSSARY OF ABBREVIATIONS

The Act	=	National Labor Relations Act
ALJ	=	Administrative Law Judge
The Board	=	National Labor Relations Board
Charging Party	=	United Steelworkers Union
General Counsel	=	Counsel for NLRB at trial
Judge Ringler	=	Administrative Law Judge Robert A. Ringler
Ms. Jones	=	Carolyn Jones (OHL employee)
NLRA	=	National Labor Relations Act
NLRB	=	National Labor Relations Board
OHL	=	Ozburn-Hessey Logistics, LLC
Order	=	The November 17, 2014 Order of the National Labor Relations Board
"The Union" or "USW"	=	United Steelworkers Union

SUMMARY OF THE ARGUMENT

As it currently stands, the Union's election victory rests upon a razor-thin margin of three votes out of the 343 total ballots cast in a representation election. The Union's victory by less than 1% of the ballots is premised on voters whose eligibility was called into question before the election even took place. Carolyn Jones, a former employee who was terminated prior to the election for using racial epithets and falsifying a witness statement, was only allowed to vote because she filed an unfair labor practice charge, the ultimate outcome of which remains uncertain. She was a former OHL employee at the time of the election. Additionally, the eligibility of two Administrative Assistants, Tia Harris and Rachel Maxie-Chaisson was specifically identified as a disputed issue before the election ever took place, and the parties stipulated that they would resolve the eligibility of the Administrative Assistants in post-election litigation if their votes were outcome determinative. (A. 203). Accordingly, this appeal does not arise from sour grapes. Rather, it is the litigation of votes whose eligibility was called into question before the election even took place.

Rather than addressing OHL's arguments head-on, the NLRB and USW devote a large portion of their briefs to reiterating this Court's deferential standard

of review in this case.¹ However, deference has its limits, and OHL is not seeking to overturn factual findings or credibility determinations of the Board. Instead, OHL is pointing out how undisputed facts in the record clearly establish that employees, Tia Harris and Rachel Maxie-Chaisson, are plant clerical employees within the parameters of existing Board law.

The Board and USW fail to even address the validity of Carolyn Jones' vote since the underlying unfair labor practice charge relating to her termination is pending in another case before this Court.

In arguing in opposition to OHL's election objections, the Board and USW minimize threatening conduct and improper electioneering by claiming that it was not disseminated in a manner that would affect the election. However, in light of the extremely close margin of victory, even a one vote swing has the potential to change the outcome of the election.

¹ The Board's brief argues an "abuse of discretion" standard of review but does not cite a D.C. Circuit case for that standard of review. The U.S. Supreme Court has noted that, "[t]he Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951).

ARGUMENT

I. All Parties Agree That the Validity of Carolyn Jones Vote Will Turn on the Outcome of Her Unfair Labor Practice Charge that is Currently Pending Before This Court.

It appears that all parties are in agreement that the validity of Carolyn Jones' vote will turn on the outcome of the unfair labor practice charge relating to her termination, which is currently pending before this court in Case 14-1253 and 14-1289. (NLRB Brief, p. 13; USW Brief, p. 9).

It also appears that the parties further agree that if OHL does not prevail in Case 14-1253, then the Court need not reach the issue of the Administrative Assistants' votes because there would be no mathematical way for OHL to win the election. For this reason, OHL intends to move this Court to consolidate this appeal with Case 14-1253 and 14-1289. The outcome of Carolyn Jones' unfair labor practice charge is inextricably intertwined with the outcome of the election, and OHL respectfully submits that both should be considered in a single proceeding.

II. The Challenges to the Administrative Assistants' Votes Should Be Overruled.

The Board's decision, and its argument in this case, relies on factually inaccurate conclusions about where the Administrative Assistants worked in relation to other unit employees, where they took their breaks in relation to other

unit employees, and the Administrative Assistants' functional integration with other unit employees.

The Board and the USW espouse a fundamental misunderstanding that is belied by the record concerning the location where the Administrative Assistants worked in relation to other unit employees. The Board's attorneys argue that the Administrative Assistants work "in an office area that is separate from warehouse employees." (NLRB Brief, p. 19). However, the Board's finding was not that the Administrative Assistants worked in an office area separate "*from warehouse employees.*" (A. 227). Rather the Board's finding was that the Administrative Assistants work in a "separate area." However, the undisputed evidence reflects that the Administrative Assistants did not work in a separate area from other unit employees.

Unit employees, including Inventory Control Employees and Leads, work in the same office area where Ms. Harris does. (A. 94). Unit employees, including Inventory Control Employees and Customer Service Representatives, work in the same office area where Ms. Maxie-Chaisson does. (A. 154). While the Board's argument on appeal that the Administrative Assistants worked in a different work area *from warehouse employees* is correct, that is not the Board's finding, nor is it the relevant inquiry. Instead, the undisputed evidence in the

record establishes that the Administrative Assistants work in the same area as other unit employees, which weighs in favor of their inclusion in the unit.

Similarly, the Board argues that the Administrative Assistants "have a separate break area." However, that contention is also belied by the record. Ms. Maxie-Chaisson testified that she took breaks in the break room or out in her truck. (A. 154). There was no testimony that this was a different location than unit employees take breaks. Similarly, Ms. Harris testified that unit employees took breaks in the same breakroom where she did. (A. 95). This testimony was also unrebutted. Hence, the contentions that the Administrative Assistants worked in a separate area and took breaks in a separate area are simply unsupported by the record evidence.

The Board's conclusory argument that the work of the Administrative Assistants is incidental to the production process, as opposed to integral to it, is incorrect. Office clerical employees still have phones to answer, mail to process, and filing to do, even when the production process is not taking place. Conversely, there is a direct connection between the work of the unit employees and the work of the Administrative Assistants because without the unit employees there would be no productivity to measure and no data to enter. Additionally, Ms. Maxie-Chaisson had direct regular discussions with other unit employees regarding productivity measurement. (A. 144-145). The Administrative

Assistants' connection to the production process is comparable to the plant clerical employees described in the cases cited in OHL's opening brief.

The Board's attorneys attempt to distinguish the Board precedent cited in support of OHL's argument that the Administrative Assistants were plant clerical employees. For example, the Board's brief argues that the employees at issue in *Kroger Co.*, 342 NLRB 202 (2004) "contribut[ed] more directly to the production process" and "shared more in common with production employees than here." (NLRB Brief, p. 21). The Board further argues in its brief that the employees at issue in *Hamilton Halter Co.*, 270 NLRB 331 (1984) transcribe sales which was "a function closely associated with production." (NLRB Brief, p. 22).

There are two problems with the Board's attempts to distinguish this precedent. First, the Board's argument does not explain *why* the employees in *Kroger* "contributed more directly to the production process" or *why* they "shared more in common with production employees than here." The Board's argument does not explain *why* the employees in *Hamilton* performed a function "more closely associated with production." Instead, the Board's argument relies on self-serving threadbare conclusions to attempt to distinguish the cases cited by OHL.

Additionally, even if the Board's brief were drawing substantive distinctions (which it is not), those distinctions are the *post hac* rationalizations of the Board's lawyers defending its decision on appeal, as opposed to a reasoned

judgment of the Board itself in the decision. The Board itself did not attempt to distinguish these cases in its decision.

Finally, the Board's brief summarily dismissed the evidence of overlap and interchange between the Administrative Assistant and Unit Employee. As indicted in OHL's opening brief, both Ms. Harris and Ms. Maxie-Chaisson performed identical job functions that were also performed by unit employees. Kaycee Harden, a Senior CSR (a stipulated unit position generated invoices and inputted data into the Red Prairie system. (A. 136-137). Ms. Harden entered data and created productivity reports. *Id.* Similarly, Customer Service Representative, Tondra Mitchell (a unit employee]), handled billing for the account where she worked, just like Ms. Harris and Ms. Maxie Chaisson worked on billing in their accounts. (A. 49). When Ms. Mitchell went out on medical leave, Ms. Maxie-Chaisson filled-in for her closing orders. (A. 49-50).

While acknowledging this overlap and interchange, the Board's brief dismisses this evidence by stating the obvious, "no one factor is determinative when applying the community of interest test." (NLRB Brief, p. 23). While this evidence may or may not be determinative, the Board's brief offers no explanation why the Board's Decision failed to analyze or even mention this evidence in its analysis.

Because the Board relies upon factually false conclusions that are not supported by the record, and because it failed to distinguish relevant precedent in its decision, the challenges to the Administrative Assistants' votes should be overruled.

III. OHL's Election Objections Should be Sustained.

The Board's primary argument in support of overruling OHL's election objections is that conduct at issue was not widely disseminated such that it could affect the outcome of the election or create a general atmosphere of fear and reprisal. However, there are two related arguments that the Board fails to address that merit reiterating.

With respect to Keith Hughes' threat to rip a t-shirt off of the back of an employee, the Board found that Mr. Hughes threat was "mitigated" because OHL disciplined Mr. Hughes. However, OHL did not discipline Mr. Hughes until August 25, 2012, almost a month *after* the election. *See Ozburn Hessey Logistics*, 362 NLRB No. 180, p. 24 (Aug. 26, 2015). The Board does not address in its brief how the effect of Mr. Hughes threat was mitigated by discipline that occurred after the election, which was the Board's underlying rationale in its decision for why Mr. Hughes' threat was mitigated.

Similarly, the Board discounted a union election observer electioneering outside of the polling location on the basis that the employee who the observer

"high fived" had voted and therefore the electioneering conduct could not have interfered with his vote. However, the Board's analysis fails to appreciate that the misconduct occurred just outside of the polling location where employees were coming to vote, and regardless of who could hear the comment, and the *visual effect* of a union election observer "high fiving" union supporters just outside of the polling location was prejudicial. The Board's brief does not address this visual effect and its interference with the extremely close election.

IV. The Lack of an Underlying Unfair Labor Charge is Not a Technicality.

The Board sticks to its position that refusing to bargain in response to a May 2013, is "closely related" to refusing to bargain over a separate certification 18 months later. In support of this contention, the Board argues that the second refusal to bargain "was part of a continuum of events" that began with the filing of a petition for representation in June 2011 and "culminated" with OHL's refusal to bargain for the purpose of testing certification in November 2014. By the Board's rationale, everything that occurred between the Union and OHL for a three year period falls on a "continuum," such that the Board can prosecute unfair labor practices even in the absence of a charge specifically alleging the unlawful conduct. The Board's argument lack both logical and legal support.

CONCLUSION

For all of the foregoing reasons, OHL respectfully requests that this Court: (1) reverse the findings of the NLRB in the Decision and Order; (2) grant OHL's Petition for Review and deny the NLRB's Cross-Petition for Enforcement. Specifically, OHL requests that the Court direct the Board to: (1) disregard Carolyn Jones' vote (or to the extent that it cannot be discerned set aside the election); (2) open the ballots and count the votes of Rachel Maxie-Chaisson and Tia Harris; (3) issue a revised tally of votes with a certification of results; alternatively, (4) set aside the election based on OHL's objections and conduct a re-run election; or alternatively, (5) set aside the Board's decision based on the absence of a charge that alleges a refusal to bargain following the Board's November 17, 2014 certification.

Respectfully submitted,

s/ Ben H. Bodzy

S/BEN H. BODZY

BAKER, DONELSON, BEARMAN
CALDWELL & BERKOWITZ, P.C.

Ben Bodzy (Tenn. Bar No. 023517)

Baker Donelson Center, Suite 800

211 Commerce Street

Nashville, TN 37201

615.726.5600 (phone)

bbodzy@bakerdonelson.com

And

Stephen D. Goodwin (Tenn. Bar No. 6294)
First Tennessee Bank Building
165 Madison Avenue, Suite 2000
Memphis, TN 38103
901.577.2141 (phone)
sgoodwin@bakerdonelson.com

*Attorneys for Ozburn-Hessey Logistics,
LLC*

REQUEST FOR ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a), OHL respectfully requests that the Court schedule oral argument in this case. There is an extensive record in this case which raises substantial issues regarding the validity of a union certification, and OHL submits that oral argument would assist the Court in resolving the issues in this case.

CERTIFICATE OF COMPLIANCE

I, Ben H. Bodzy, certify that this Reply Brief complies with the type-volume limitation specified in Federal Rule of Appellate Procedure 32(a)(5) and 32(a)(7) and Local Rule 32(a)(2). This brief has been prepared using Microsoft Office 2010 and uses a fourteen point proportionally spaced serif typeface (Times New Roman with Garamond headings). Exclusive of the Table of Contents; Table of Authorities; Glossary; Request for Oral Argument; and Certificates of Counsel, this brief contains 2,193 words, including footnotes according to the word count in Microsoft Word.

s/BEN H. BODZY

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief of Ozburn-Hessey Logistics, LLC was filed electronically with the Court's CM/ECF system and served via U.S. mail to the addresses described below this 21st day of January, 2016:

Linda Dreeben
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Robert J. Englehart
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

David Seid
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Amanda Fisher
United Steelworkers of America
Five Gateway Center
60 Boulevard of the Allies, Suite 807
Pittsburgh, PA 15222

s/BEN H. BODZY

Ben H. Bodzy